Qatar Islamic Bank v Asian Finance Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC-264–08 OF 2014
WONG KIAN KHEONG JC
18 SEPTEMBER 2014

Companies and Corporations — Articles of association — Separate shareholders agreements — Conflicting provisions — Whether shareholders agreements to prevail — Whether shareholders agreements to be construed in commercially sensible manner — Whether shareholders' relationship regulated by shareholders agreements — Whether doctrine of privity of contract applicable to shareholders agreements

Companies and Corporations — Memorandum and articles of association — Articles of association — Appointment of directors — Whether all shareholders entitled to have representation in board of directors — Whether certain shareholders could object to re-election of a retiring director

The original shareholding of the first defendant company ('D1') was as follows: the plaintiff held 70% shares, the fourth defendant company ('D4') owned 20% shares and Global Investment House ('Global') held 10% shares. The plaintiff, D4 and Global entered into a shareholders agreement in relation to D1 (the 'SA'). The plaintiff, D4 and D5 later entered into a deed of adherence ('the first DOA') as Global sold all of its shares in D1 to D5. A second deed of adherence ('the second DOA') was concluded by the plaintiff, D4 to D6 because the plaintiff transferred 10% of its shares in D1 to D6. Hence, the present shareholders of D1 were as follows: (a) the plaintiff 66.67%; (b) D4 16.67%; (c) D5 6.67%; and (d) D6 10%. The second defendant (D2) was previously proposed by the plaintiff to be a director of D1 to represent the plaintiff in D1's board of directors (BOD). Upon the D6's acquisition of 10% shares in D1, D2 was deemed a director of D1 to represent D6 under cl 3.1 of the second DOA ('cl 3.1'). The third defendant ('D3') was the corporate representative of D5 in the BOD. D1's annual general meeting was held on 29 April 2014 ('AGM'). At the AGM the plaintiff's corporate representative (the plaintiff's representative) informed the AGM that the plaintiff had instructed him to vote against the re-election of D2 as D1's director. The AGM was adjourned to enable all shareholders of D1 to obtain legal opinion on, among others, their rights under SA and whether a shareholder had the right to vote against the re-election of a director who represented another shareholder. A reconvened adjourned AGM was held on 25 June 2014. At the reconvened adjourned AGM the plaintiff's representative voted against the re-election of

D2 and D3 as D1's directors. Despite 66.67% shares of D1's shares cast by the plaintiff's representative against the re-election of D2 and D3 as D1's directors, the chairman did not declare the results of such votes pursuant to legal advisethe plaintiff's representative had breached an earlier order of court in so voting. The plaintiff then filed the present suit seeking, among others, a declaration that D2 and D3 were not re-elected D1's directors at the Reconvened Adjourned AGM by virtue of article 69 and had ceased to be D1's directors on 29 April 2014 (date of AGM). D2 and D3 counterclaimed for, among others, the following relief: (i) a declaration that the SA had been duly incorporated into D1's memorandum of association (MA) and articles of association (AA); (ii) a declaration that D1's management shall be conducted in accordance with the SA notwithstanding any provision to the contrary in the MA and AA; (iii) an order for specific performance of cl 6.2 of the SA (cl 6.2) read with cl 3.1 and article 70(e) AA (article 70(e)) and the plaintiff to take all steps and do all things necessary to effect the re-election of D2 and D3 as D1's directors; (iv) a mandatory injunction to compel the plaintiff to: (a) ensure that the BOD shall comprise 9 directors consisting of persons nominated by each shareholder of D1 in accordance with the SA and second DOA; (b) amend the MA and AA to formally reflect the SA and second DOA; and (c) fully comply with and give effect to the terms of the SA and second DOA; (v) a declaration that the Plaintiff was not entitled to vote in opposition of any motion for the appointment or re-election of any director of D1 who was nominated by any shareholder of D1 pursuant to the SA and AA. The main issue arising for determination was whether the plaintiff was entitled to vote against the re-election of D2 and D3 as D1's directors.

Held:

(1) The use of the mandatory word 'shall' in article 70 of the AA clearly showed that all shareholders of D1 were entitled to have representation in the BOD. A literal reading of article 70(e) of the AA had the following effect:(i) only the nominating shareholder can require the removal and substitution of a director nominated by the nominating shareholder (nominated director); and (ii) a shareholder who did not nominate a director (other shareholder), cannot require the removal and substitution of the nominated director. The word 'appointment' in article 70(e), (f) and (g) should be implied to include the power of a nominating shareholder to re-nominate and re-appoint a nominated director who is required to retire by articles 66 and 68 (retiring director). If only the nominating shareholder may re-appoint the retiring director under article 70(e), (f) and (g), the other shareholders had no power to object to the re-election of the retiring director (see para 39(b)).

(2) If any of the other shareholders could object to the re-election of the retiring director as re-nominated by the nominating shareholder, this would be contrary to: (i) article 70 which ensured BOD representation

for the nominating shareholder; (ii) article 70(e) which vested the power to re-appoint the retiring director solely in the nominating shareholder; and (iii) article 70(g) which required all the other shareholders to procure the re-election of the retiring director (see para 39(d)).

(3) Article 53 merely provided that a resolution at any general meeting of D1 shall be decided on a poll. Article 53 did not provide for the re-appointment of a retiring director, let alone confer a right on the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder. Article 72 concerned the power to remove a director before the expiration of his or her period of office and the re-appointment of another person in place of the removed director. Article 72 could not be construed to entitle the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder. In any event, the specific provisions of article 70(e) and (g) should prevail over the general provisions of articles 53 and 72 by virtue of the application of the canon of construction, *generalia specialibus non derogan* (see paras 42(b) & 45).

(4) The SA and second DOA bound the plaintiff and D4 to D6 even if the SA and second DOA were contrary to the AA. However, there was no inconsistency between the AA on the one hand and the SA and second DOA on the other hand. The court had to construe the SA and the second DOA in a commercially sensible manner without undue emphasis on technical interpretations and niceties of language. The SA regulated the relationship of the plaintiff and D4 to D6 as shareholders of D1 (see para 51).

(5) Clause 3.1 of the second DOA did not provide any right to the plaintiff, either expressly or by necessary implication, to object to the re-election of D2 as a director of D1. It was expressly stated in cl 3.1 that D2 would continue to be D1's director representing D6 and all parties agreed to cause D1 to 'facilitate the appointment' of D6's nominee. By the plaintiff's objection to the re-election of D2 as D6's nominee, the plaintiff had breached cl 3.1 (see para 54).

(6) Clause 6.2 of the SA expressly conferred the right to BOD representation on all of D1's shareholders. The only exceptions to the right of D1's shareholder to appoint D1's director were provided in cl 6.3. Clause 6.3 did not apply to bar the re-election of D2 and D3 as D1's directors. This negatived any right of any shareholder of D1, including the plaintiff, to object to any appointment of a nominated director by a nominating shareholder. the right of d1's shareholder to appoint a director of D1 under cl 6.2 included the right to re-nominate the same nominated director for re-election in the BOD. Hence, the plaintiff had also breached cl 6.2 in opposing the re-election of D2 and D3 as D1's directors (see para 60).

(7) Only D4 to D6 could enforce cll 3.1 and 6.2 against the plaintiff. D2 and D3, despite being the subject matter of the plaintiff's objection, had no cause of action to counterclaim against the plaintiff as they were not parties to the SA and second DOA. The doctrine of privity of contract only allows a contracting party to sue and claim for relief in a breach of contract (see para 65).

[Bahasa Malaysia summary

Pegangan saham asal syarikat defendan pertama ('D1') adalah seperti berikut: plaintif memegang 70% saham, syarikat defendan keempat ('D4') memiliki 20% saham dan Global Investment House ('Global') memegang 10% saham. Plaintif, D4 dan Global memaski perjanjian pegangan saham berkaitan dengan D1 ('PS itu'). Plaintif, D4 dan D5 kemudian telah memasuki surat ikatan pematuhan ('SIP pertama') kerana Global telah menjual sahamnya dalam D1 kepada D5. Surat ikata pematuhan kedua ('SIP kedua') telah disempurnakan oleh plaintif, D4 kepada D6 kerana plaintif telah memindahkan 10% daripada sahamnya dalam D1 kepada D6. Justeru, pemegang saham D1 adalah seperti berikut: (a) plaintif 66.67%; (b) D4 16.67%; (c) D5 6.67%; dan (d) D6 10%. Defendan kedua ('D2') sebelum itu telah dicadangkan oleh plaintif untuk menjadi pengarah D1 bagi mewakili plaintif dalam lembaga pengarah D1 ('LP'). Selepas pemerolehan 10% saham D6 dalam D1, D2 telah dianggap pengarah D1 untuk mewakili D6 di bawah klausa 3.1 SIP kedua ('klausa 3.1'). Defendan ketiga ('D3') adalah wakil korporat D5 dalam LP itu. Mesyuarat agung tahunan D1 telah diadakan pada 29 April 2014 ('MAT'). Di MAT itu wakil korporat plaintif ('wakil plaintif') memberitahu MAT itu bahawa plaintif telah mengarahkannya untuk mengundi untuk menghalang pemilihan semula D2 sebagai pengarah D1. MAT itu telah ditangguhkan bagi membolehkan semua pemegang saham D1 untuk memperoleh pandangan undang-undang berhubung, antara lain, hak-hak mereka di bawah PS itu dan sama ada pemegang saham mempunyai hak untuk mengundi terhadap pemilihan semula pengarah yang mewakili pemegang saham lain. Sambungan semula MAT yang ditangguhkan telah diadakan pada 25 Jun 2014. Dalam sambungan semula MAT yang ditangguhkan itu wakil plaintif telah mengundi untuk menghalang pemilihan semula D2 dan D3 sebagai pengarah-pengarah D1. Walaupun saham 66.67% saham D1 dibuat oleh wakil plaintif terhadap pemilihan semula D2 dan D3 sebagai pengarah-pengarah D1, pengerusi tidak mengisytiharkan keputusan undian tersebut berikutan nasihat undang-undang wakil plaintif telah melanggar perintah mahkamah terdahulu dengan undian itu. Plaintif kemudian telah memfailkan guaman ini memohon, antara lain, deklarasi bahawa D2 dan D3 tidak memilih semula pengarah-pengarah D1 di sambungan semula MAT yang ditangguhkan menurut perkara 69 dan bukan lagi pengarah-pengarah D1 pada 29 April 2014 ('tarikh MAT'). D2 dan D3 telah menuntut balas untuk, antara lain, relief berikut" (i) deklarasi bahawa PS itu telah pun dimasukkan dalam memorandum syarikat ('MS') dan artikel syarikat ('AS'); (iii) deklarasi bahawa

pengurusan D1 hendaklah dilakukan menurut PS walaupun terdapat peruntukan yang bertentangan dalam MS dan AS; (iii) perintah untuk pelaksanaan spesifik klausa 6.2 PS (klausa 6.2) dibaca dengan klausa 3.1 dan artikel 70(e) (artikel 70(e)) dan plaintif untuk mengambil segala langkah dan berbuat semua yang patut untuk menguatkuasakan pemilihan semula D2 dan D3 sebagai pengarah-pengarah D1; (iv) injunksi mandatori untuk mendesak plaintif untuk: (a) memastikan bahawa LP itu hendaklah mengandungi sembilan pengarah yang terdiri daripada orang-orang yang dicalonkan oleh setiap pemegang saham D1 menurut PS itu dan SIP kedua; (b) meminda MS dan AS untuk menggambarkan secara formal PS itu dan SIP kedua; dan (c) mematuhi sepenuhnya dengan dan memberikan kesan kepada terma-terma PS itu dan SIP kedua itu; (v) deklarasi bahawa plaintif tidak berhak untuk mengundi dengen membantah apa-apa usul untuk pelantikan atau pemilihan semula mana-mana pengarah D1 yang dicalonkan oleh mana-mana pemegang saham D1 menurut PS dan AS itu. Isu utama yang timbul untuk ditentukan adalah sama ada plaintif berhak mengundi terhadap pemilihan semula D2 dan D3 sebagai pengarah-pengarah D1.

Diputuskan:

(1) Penggunakan perkataan mandatori 'shall' dalam artikel 70 AS jelas menunjukkan bahawa kesemua pemegang saham D1 berhak mendapat wakil dalam LP itu. Bacaan harfiah artikel 70(e) AS mempunyai kesan berikut: (i) pemegang saham yang mencalonkan boleh menghendaki penyingkiran dan penggantian pengarah yang dicalonkan oleh pemegang yang dicalonkan (pengarah yang dicalonkan); dan (ii) pemegang saham yang tidak mencalonkan pengarah (pemegang saham lain), tidak boleh menghendaki penyingkiran dan penggantian pengarah yang dicalonkan. Perkataan 'appointment' dalam artikel 70(e), (f) dan (g) hendaklah dianggap termasuklah kuasa pemegang saham yang dicalonkan untuk mencalonkan semula dan melantik semula pengarah yang dicalonkan yang dikehendaki untuk bersara oleh artikel-artikel 66 dan 68 (pengarah bersara). Jika hanya pemegang saham yang mencalonkan boleh melantik semula pegarah bersara di bawah artikel 70(e), (f) dan (g), pemegang saham lain tiada kuasa untuk membantah pemilihan semula pengarah bersara (lihat perenggan 39(b)).

(2) Jika mana-mana pemegang saham lain boleh membantah pemilihan semula pengarah bersara sebagaimana pencalonan semula oleh pemegang saham yang dicalonkan, ini adalah bertentangan kepada: (i) artikel 70 yang memastikan wakil LP untuk pemegang saham yang dicalonkan; (ii) artikel 70(e) yang memberi kuasa untuk pelantikan semula pengarah bersara semata-mata dalam pemegang saham yang mencalonkan; dan (iii) artikel 70(g) yang menghendaki semua pemegang saham lain untuk mendapatkan pemilihan semula pengarah bersara (lihat perenggan 39(d)).

(3) Artikel 53 hanya memeruntukkan bahawa satu resolusi di mana-mana mesyuarat agung D1 hendaklah diputuskan mengikut undian. Artikel 53 tidak memperuntukkan untuk pelantikan semula pengara bersara, apatah lagi memberikan hak kepada pemegang saham lain untuk membantah pemilihan semula pengarah bersara yang dicalonkan semula oleh pemegang saham yang mencalonkan. Artikel 72 berkenaan kuasa untuk menyingkirkan pengarah sebelum tamat tempoh jawatannya dan pelantikan semula orang lain menggantikan pengarah yang disingkir. Artikel 72 tidak boleh ditafsirkan untuk memberi hak kepada pemegang saham lain membantah pemilihan semula pengarah bersara yang dicalonkan semula oleh pemegang saham yang mencalonkan. Dalam apa-apa keadaan, peruntukan spesifik artikel 70(e) dan (g) hendaklah mengatasi peruntukan am artikel 53 dan artikel 72 menurut pemakaian kanun pembinaan, *generalia specialibus non derogan* (lihat perenggan 42(b) & 45).

(4) PS itu dan SIP kedua mengikat plaintif dan D4 hingga D6 meskipun PS itu dan SIP kedua adalah bertentangan dengan AS. Walau bagaimanapun, tiada yang tidak konsisten antara AS di satu pihak dan PS dan SIP kedua itu di satu pihak. Mahkamah hendaklah mentafsirkan PS dan SIP kedua itu secara komersial yang sewajarnya tanpa penekanan yang tidak wajar kepada pentafsiran teknikal dan maksud bahasa. PS itu mengawal hubungan plaintif dan D4 hingga D6 sebagai pemegang-pemegang saham D1 (lihat perenggan 51).

(5) Klausa 3.1 SIP kedua tidak memperuntukkan apa-apa hak kepada plaintif, sama ada secara nyata atau tersirat, untuk membantah pemilihan semula D2 sebagai pengarah D1. Adalah dinyatakan dengan jelas dalam klausa 3.1 bahawa D2 akan terus menjadi pengarah D1 yang mewakili D6 dan semua pihak bersetuju untuk menyebabkan D1 'facilitate the appointment' calon D6. Dengan bantahan plaintif berhubung pemilihan semula D2 sebagai calon D6, plaintif telah melanggar klausa 3.1 (lihat perenggan 54).

(6) Klausa 6.2 PS itu jelas memberikan hak kepada wakil LP ke atas semua pemagang saham D1. Satu-satu pengecualian kepada hak pemegang saham D1 untuk melantik pengarah D1 diperuntukkan dalam klausa 6.3. Klausa 6.3 tidak terpakai untuk menghalang pemilihan semula D2 dan D3 sebagai pengarah-pengara D1. Ini menidakkan apa-apa hak mana-mana pemegang saham D1, termasuklah plaintif, untuk membantah apa-apa pelantikan pengarah yang dicalonkan oleh pemegang saham yang mencalonkan. Hak pemegang saham D1 untuk melantik pengarah D1 di bawah 6.2 termasuklah hak untuk mencalon semula pengarah sama yang dicalonkan untuk pemiihan semula pengarah sama yang dicalonkan untuk pemilihan semula dalam LP itu. Justeru, plaintif juga telah melanggar klausa 6.2 kerana membantah

pemilihan semula D2 dan D3 sebagai pengarah-pengarah D1 (lihat perenggan 60).

(7) Hanya D4 hingga D6 boleh menguatkuasakan klausa 3.1 dan 6.2 terhadap plaintif. D2 dan D3, meskipun menjadi hal perkara bantahan plaintif, tidak mempunyai kausa tindakan untuk menuntut balas terhadap plaintif kerana mereka bukan pihak-pihak kepada PS dan SP kedua. Doktrin priviti kontrak hanya membenarkan pihak yang berkontrak untuk menyaman dan menuntut relief kerana pelanggaran kontrak (lihat perenggan 65).]

Cases referred to

Attorney General of Belize & Ors v Belize Telecom Ltd & Anor [2009] 2 All ER 1127, PC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (folld)

Bratton Seymour Service Co Ltd v Oxborough [1992] BCLC 693, CA (folld)

Curtis v Stovin (1889) LR 22 QBD 513, CA (folld)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 2) [1998] 1 MLJ 110, CA (refd)

Grundt v Great Boulder Proprietary Gold Mines Ltd [1948] 1 All ER 21, CA (refd)

Holmes & Anor v Lord Keyes & Ors [1958] 1 All ER 129, QBD (refd)

Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal [2013] 2 MLJ 297; [2013] 2 CLJ 277, FC (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

Ling Beng Hui v Ling Beng Sung [1990] 2 MLJ 186, HC (refd)

Ling Nam Rubber Works v Leong Bee & Co (No 2) [1968] 1 MLJ 265, FC (refd)

Mohamed Yahaya v Ms Ally Sdn Bhd & 11 Ors [1985] 1 MLJ 243 (refd)

Rayfield v Hands & Ors [1958] 2 All ER 194, Ch D (refd)

Hartley Baird Ltd, Re [1954] 3 All ER 695, Ch D (refd)

Russell v Northern Bank Development Corpn Ltd [1992] 3 All ER 161, HL (folld)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (folld)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286, FC (refd)

Solaiappan & Ors v Lim Yoke Fan & Ors [1968] 2 MLJ 21, FC (refd)

Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)

Wong Kim Fatt v Leong & Co Sdn Bhd & Anor [1976] 1 MLJ 140 (consd)

Wood v Odessa Waterworks Co (1889) 42 Ch D 636, Ch D (refd)

Yap Ban Tick & Ors v Standard Chartered Bank [1995] 3 MLJ 401, CA (refd)

Legislation referred to

Companies (Northern Ireland) Order 1986 [UK] art 131
Companies Act 1965 ss 33(1), 128(1), 152(1)
Islamic Banking Act 1983 s 43
Islamic Financial Services Act 2013
Legal Profession (Practice and Etiquette) Rules 1978 r 20(a)

Lim Chee Wee (Nimalan Devaraja & Ong Doen Xian with him) (Skrine) for the plaintiff.
Kelvin Seet (Vendee Chai with him) (Cheang & Ariff) for the first defendant.
Azhar Azizan Harun (Jamie Wong with him) (Jamie Wong) for the second, third, fourth, fifth and sixth defendants.

Wong Kian Kheong JC:

A. FACTS

[1] This is a case on the interpretation of a company's articles of association ('AA') and the agreement among shareholders of that company.

[2] The first defendant company ('first defendant') is a public limited company licensed under the Islamic Banking Act 1983 ('IBA'). Upon the repeal of IBA, the first defendant is deemed to be licensed under the Islamic Financial Services Act 2013 ('IFSA'). The first defendant carried on business as an Islamic bank.

[3] The original shareholding of the first defendant is as follows:

(a) the plaintiff company ('the plaintiff') held 70% shares in the first defendant;

(b) the fourth defendant company (the fourth defendant) owned 20% shares in the first defendant; and

(c) Global Investment House, a company incorporated in Kuwait ('Global') held 10% shares in the first defendant.

[4] The plaintiff, fourth defendant and Global entered into a shareholders agreement dated 19 November 2006 in relation to the first defendant ('SA').

[5] On 3 September 2008, the plaintiff, fourth and fifth defendants entered into a deed of adherence ('first DOA') as Global sold all of its shares in the first defendant to the fifth defendant.

[6] A second deed of adherence ('second DOA') was concluded on 27 September 2010 by the plaintiff, fourth to sixth defendants because the plaintiff transferred 10% of its shares in the first defendant to the sixth defendant.

[7] The present shareholders of the first defendant are as follows:

(a) the plaintiff holds 66.67% shares in the first defendant;

(b) the fourth defendant owns 16.67% shares in the first defendant;

(c) the fifth defendant has 6.67% shares in the first defendant; and

(d) the sixth defendant holds 10% shares in the first defendant.

[8] The second defendant ('the second defendant') was previously proposed by the plaintiff to be a director of the first defendant to represent the plaintiff in the first defendant's board of directors ('BOD'). Upon the sixth defendant's acquisition of 10% shares in the first defendant, the second defendant was deemed a director of the first defendant to represent the sixth defendant — cl 3.1 of the second DOA (cl 3.1).

[9] The third defendant ('the third defendant') is the corporate representative of the fifth defendant in the BOD.

[10] On 4 April 2014, the first defendant's company secretary, Cik Hasnita Sulaiman ('company secretary') issued a notice for the first defendant's annual general meeting of shareholders to be held on 29 April 2014 ('AGM') with the following agenda:

...

(3) To re-elect Directors.

(i) in accordance with Article 68 [AA] [Art. 68], the following Directors shall retire and being eligible by virtue of Article 67 [AA] [Art. 67] offer themselves for re-election:

()(a) [2nd Defendant]

() ...

(ii) in accordance with Article 71 [AA] [Art. 71], the following , Directors shall retire and being eligible by virtue of [Art. 71] offer themselves for re-election:

...

(b) [3rd Defendant] ...

[AGM Notice]

[11] The above facts are undisputed. Before this suit, two proceedings have been filed in two other High Courts and are still pending. As such, I will confine my subsequent narration to undisputed facts relevant to this case only.

[12] At the AGM:

(a) the chairman was Dr Saleh Malaikah, corporate representative for the fourth and fifth defendants ('Dr Saleh');

(b) the plaintiff's corporate representative, Mr Giles Cunningham ('the plaintiff's representative') informed the AGM that the plaintiff had instructed him to vote against the re-election of the second defendant as the first defendant's director;

(c) the plaintiff's representative requested a vote by poll; and

(d) the AGM was adjourned by Dr Saleh to enable all shareholders of the first defendant to obtain legal opinion on, among others, their rights under SA and whether a shareholder had the right to vote against the re-ejection of a director who represented another shareholder.

[13] On 10 June 2014 the company secretary issued notice for the reconvened adjourned AGM ('reconvened adjourned AGM') to be held on 25 June 2014 ('reconvened adjourned AGM notice'). The reconvened adjourned AGM notice stated, among others:

> ...
>
> (3) To re-elect Directors
>
> (i) in accordance with [Art. 68], the following Directors shall retire and being eligible by virtue of [Art. 67] offer themselves for re-election:
>
> ()(a) [2nd Defendant] [Item 3(i)(a)]
>
> () ...
>
> (ii) in accordance with [Art. 71], the following Directors shall retire and being eligible by virtue of [Art. 71] offer themselves for re-election:
>
> ...
>
> (b) [3rd Defendant] [Item 3(ii)(b)] ...

[14] Unknown to the plaintiff, on 10 June 2014 the fourth to sixth defendants filed Kuala Lumpur High Court (Commercial Division) Originating Summons No 24 NCC 212–06 of 2014 ('the first suit').

[15] In the first suit, the fourth to sixth defendants obtained an ex parte injunction on 18 June 2014 against, among others, the plaintiff and the

plaintiff's representative to restrain them from breaching the SA, the first and second DOA pending the disposal of the first suit ('the first ex parte order'). The first suit is still pending.

[16] On 23 June 2014, the plaintiff filed Kuala Lumpur High Court (Commercial Division) Originating Summons No 24 NCC 221–06 of 2014 against the first defendant and Dr Saleh ('the second suit').

[17] Pending the disposal of the second suit, the plaintiff obtained an ex parte injunction on 24 June 2014 against Dr Saleh to, among others, restrain him from 'interfering or preventing' the plaintiff from voting by poll pursuant to article 53 of the AA (the second ex parte order). The second suit is also pending.

[18] At the reconvened adjourned AGM:

(a) Dr Salleh was the chairman;

(b) the first and second ex parte orders were produced;

(c) the plaintiff's representative voted against the re-election of the second and third defendants as the first defendant's directors; and

(d) despite 66.67% shares of the first defendant cast by the plaintiff's representative against the re-election of the second and third defendants as the first defendant's directors, Dr Saleh did not declare the results of such votes after advice had been given by Tan Sri Dato' Sri Dr Muhammad Shafee Abdullah that the first ex parte order had been breached by the plaintiff's representative.

[19] On 9 July 2014, the fourth to sixth defendants applied for ex parte leave in the first suit to cite the plaintiff's representative for breach of the first ex parte order.

B. THIS SUIT

[20] The plaintiff filed this originating summons in court encl No 1 ('court encl No 1') against the first to the third defendants and applied for, among others, the following relief:

(a) declarations that Items 3(i)(a) and 3(ii)(b) had been put to the reconvened adjourned AGM and lost pursuant to article 69 of the AA ('art 69');

(b) consequentially, a declaration that the second and third defendants were not re-elected as first defendant's directors at the reconvened adjourned

AGM by virtue of art 69 and had ceased to be the first defendant's directors on 29 April 2014 (date of AGM); and

(c) the first defendant shall take all necessary steps within seven days from the service of an order of this court to file documents as required by the Companies Commission of Malaysia to confirm that the second and third defendants are no longer the first defendant's directors effective from 29 April 2014.

[21] Pending the disposal of this suit, the plaintiff applied in the court encl No 3 ('the court encl No 3') with a certificate of urgency for, among others, an injunction to restrain the second and third defendants from:

(a) acting or holding themselves out as the first defendant's directors;

(b) interfering in the first defendant's business or the management of the first defendant's affairs; and

(c) functioning or performing any of the duties of directors and officers of the first defendant.

[22] When the court encl Nos 1 and 3 came before me on 11 August 2014:

(a) the plaintiff's solicitors only managed to serve the cause papers for the court encl Nos 1 and 3 on the first defendant's solicitors;

(b) the plaintiff and the first defendant consented to a joint hearing of the court encl Nos 1 and 3;

(c) pending the disposal of the court encl Nos 1 and 3, the plaintiff applied for an ad interim injunction to restrain the first defendant from recognising and giving effect to the re-election of the second and third defendants as the first defendant's directors in the adjourned AGM and at the reconvened adjourned AGM ('ad interim injunction'); and

(d) despite a vigorous objection by the first defendant's learned counsel, I granted an ad interim injunction with an undertaking by the plaintiff to pay damages for any loss suffered by the first defendant due to the ad interim injunction if the court encl Nos 1 and 3 are subsequently dismissed ('plaintiff's undertaking'). My reasons for allowing the ad interim injunction are as follows:

(e) the ad interim injunction would preserve the status quo pending the disposal of the court encl Nos 1 and 3. If the ad interim injunction had not been granted, the second and third defendants would continue to act as the first defendant's directors and this might cause irreparable damage to the plaintiff;

(f) if there is any loss suffered by the first defendant due to the ad

A interim injunction, the first defendant would be adequately compensated by the plaintiff's undertaking; and

(g) an early hearing date of the court encl Nos 1 and 3 had been fixed on 5 September 2014.

B

[23] After the granting of the ad interim injunction, the second and third defendants applied to set aside the ad interim injunction ('the court encl No 8').

C **[24]** The fourth to the sixth defendants applied to intervene in this matter. The plaintiff rightly conceded to this intervention, application and accordingly, this intervention application was allowed.

D **[25]** The second and third defendants counterclaimed for, among others, the following relief in sub-paras 88(i) to (xi) ('counterclaim'):

(a) a declaration that the SA has been duly incorporated into the first defendant's memorandum of association ('MA') and AA (prayer (i) of counterclaim);

E

(b) a declaration that subject to all applicable Malaysian laws, the management of the first defendant shall be conducted in accordance with the SA notwithstanding any provision to the contrary in the MA and AA (prayer (ii) of counterclaim);

F

(c) an order for specific performance of cl 6.2 of the SA ('cl 6.2') read with cl 3.1 and article 70(e) of the AA ('art 70(e)') and the plaintiff to take all steps and do all things necessary to effect the re-election of the second and third defendants as the first defendant's directors (prayer (iii) of counterclaim);

G

(d) a mandatory injunction to compel the plaintiff, plaintiff's representative, plaintiff's directors, officers, servants, agents and nominees to take all steps and do all things necessary to:

H

(i) ensure the BOD at all times and until such time when all parties mutually agree otherwise, shall comprise nine directors consisting of persons nominated by each shareholder of the first defendant in accordance with the SA and second DOA;

I

(ii) amend the MA and AA to formally reflect the SA and second DOA; and

(iii) fully comply with and give effect to the terms of the SA and second DOA.

(prayer (iv) of counterclaim);

(e) an injunction to restrain the plaintiff, plaintiff's representative, plaintiff's directors, officers, servants, agents and nominees from breaching the SA and second DOA, including but not limited to the following:

(i) taking any step or action or doing anything whatsoever to prevent or impair the re-election of the second defendant (the sixth defendant's nominee) as the first defendant's director subject to the fulfilment of cl 6.3 of the SA ('cl 6.3');

(ii) convening or holding any BOD meeting in contravention of SA, first and second DOA; and

(iii) doing any act or exercising any vote at the AGM or any general meeting of the first defendant against or which would prevent the re-election of the second defendant (the sixth defendant's nominee) as the first defendant's director subject to the fulfilment of cl 6.3.

(prayer (v) of counterclaim);

(f) a declaration that the second and third defendants legally remain as the first defendant's directors by virtue of the AA as the resolutions for their re-election have not been officially defeated (prayer (vi) of the counterclaim);

(g) a declaration that the votes cast by the plaintiff through the plaintiff's representative at the reconvened adjourned AGM was illegal and invalid for being in violation of the first ex parte order and thus ought not to be counted (prayer (vii) of the counterclaim);

(h) consequent to the above prayer, a declaration that the motion for the re-election of the second and third defendants was legally and effectively passed and carried at the reconvened adjourned AGM (prayer (viii) of the counterclaim);

(i) a declaration that the plaintiff is not entitled to vote in opposition of any motion for the appointment or re-election of any director of the first defendant who is nominated by any shareholder of the first defendant pursuant to the SA and AA (prayer (ix) of the counterclaim);

(j) an injunction to restrain the plaintiff, its directors, officers and/or agents from voting in opposition of any motion for the appointment or re-election of any director of the first defendant who is nominated by any shareholder of the first defendant pursuant to the SA and AA (prayer (x) of the counterclaim); and

(k) a mandatory injunction to compel the first defendant, its directors, officers and/or agents to vote in support of any motion for the appointment or re-election of any director of the first defendant who is

nominated by any shareholder of the first defendant pursuant to the SA and AA (prayer (xi) of the counterclaim).

C. SOLE ISSUE

[26] On 5 September 2014:

(a) all parties consented to a joint hearing of the court encl Nos 1, 3 and 8;

(b) all parties agreed that the sole question in this case is whether the plaintiff was entitled to vote against the re-election of the second and third defendants (proposed by the sixth and fifth defendants respectively) as the first defendant's directors; and

(c) learned counsel for the second to sixth defendants, Encik Azhar Azizan Harun, agreed that the counterclaim would be confined to the above sole question to be decided in this matter.

[27] As the first and second suits are still pending in different courts, I shall not touch on matters raised in those suits, especially on whether there has been a breach of the first ex parte order or otherwise.

D. THE PLAINTIFF'S CONTENTIONS

[28] Mr Lim Chee Wee, learned counsel for the plaintiff forwarded the following eight arguments in his written submission in support of the plaintiff's right to vote against the re-election of the second and third defendants as the first defendant's directors:

(a) the AA and SA do not prohibit the plaintiff from voting against the re-election of any director of the first defendant;

(b) there is a clear distinction between the appointment of a nominated director and the right to re-elect a director of the first defendant;

(c) both the second and third defendants had vacated their office as the first defendant's directors;

(d) art 69 allows the plaintiff to vote against the re-election of the second and third defendants as the first defendant's directors;

(e) article 53 of the AA ('art 53') provides for a mandatory mechanism that a resolution put to the vote of the meeting shall be decided on a poll. Accordingly, the plaintiff could put the re-election of the second and third defendants as the first defendant's directors to the vote of the Reconvened Adjourned AGM by poll;

(f) the results of the poll on the re-election of the second and third Defendants as the first defendant's directors had been mathematically ascertained and should be accepted;

(g) there was no breach of the first ex parte order by the plaintiff's vote against the re-election of the second and third defendants as the first defendant's directors; and

(h) the first ex parte order is a nullity by reason of want of jurisdiction due to the existence of an arbitration agreement in the SA.

[29] Mr Lim's oral submission on 5 September 2014 also relied on:

(a) articles 66 ('art 66') and 72 of the AA ('art 72'); and

(b) cl 8.1 of the SA ('cl 8.1')

[30] Mr Lim emphasised that the plaintiff is only opposed to the re-election of the second and third defendants as the first defendant's directors. The plaintiff has no intention to deprive the right of the fourth to sixth defendants to nominate any person (other than the second and third defendants) to be a director of the first defendant.

E. EFFECT OF THE AA

[31] I will first discuss the effect of the AA without referring to the SA, first and second DOA. This is due to three reasons. First, the AA has statutory effect under s 33(1) of the Companies Act 1965 (CA). Section 33(1) of the CA provides as follows:

> Subject to this Act the memorandum and *articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.* (Emphasis added.)

[32] Section 33(1) of the CA clearly provides that the AA binds the first defendant (the company in question) and its shareholders, namely, the plaintiff and fourth to sixth defendants. This has been decided in the following Malaysian cases:

(a) the Court of Appeal's judgment in *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 2)* [1998] 1 MLJ 110, at p 123;

(b) the High Court decision in *Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140, at p 142;

(c) the High Court's judgment in *Mohamed Yahaya v Ms Ally Sdn Bhd & 11 Ors* [1985] 1 MLJ 243, at pp 244–245; and

(d) the High Court case of *Ling Beng Hui v Ling Beng Sung* [1990] 2 MLJ 186, at p 189.

[33] Stirling J in the English High Court in *Wood v Odessa Waterworks Co* (1889) 42 Ch D 636, at p 642, held that the AA constitutes two statutory contracts between:

(a) the company and its shareholders (in their capacity as shareholders); and

(b) the company's shareholders inter se, namely there is a contract binding each shareholder as between or among all the shareholders themselves. This was also decided by Haidar J (as His Lordship then was) in *Ling Beng Hui*, at p 189.

[34] It is to be noted that under s 31(1) of the CA, the AA can only be amended by the first defendant by way of a 'special resolution'. Section 152(1) of the CA defines a 'special resolution' as a resolution passed by a majority of not less than three-fourths of a company's shareholders at that company's general meeting of which not less than 21 days' notice of that 'special resolution' has been duly given.

[35] The second reason for deciding on the AA without referring to the SA, first and second DOA, is that the first defendant is not a party to those agreements and the first defendant is therefore not bound by those agreements. The Federal Court held in *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 at p 322; [2013] 2 CLJ 277, at p 302, that shareholders' agreements are private matters enforceable only by the parties to those agreements.

[36] There is a third reason why I should interpret the AA without reference to the SA, first and second DOA as well as any other extrinsic evidence. This is because I accept the English Court of Appeal's judgment in *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 as follows:

(a) by Dillon LJ (as His Lordship then was), at p 697:

> To my mind it is wholly inconsistent with that judgment that *there should be any such power in the court to imply a term into the [AA] … which arises from the surrounding circumstances not apparent from the terms of the [MA] and [AA] themselves*.
>
> (Emphasis added.);

(b) by Steyn LJ (as His Lordship then was), at p 698:

> … the question is whether the implied term … can be implied not on the basis of any language to be found in the [AA], but on the basis of extrinsic circumstances. The question is, is it notionally ever possible to imply a term

in such circumstances? I will readily accept that *the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into [AA] from extrinsic circumstances.* (Emphasis added.); and

(c) by Sir Christopher Slade, at p 699:

I accept that, in construing the [AA], evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein.

F. HOW TO INTERPRET AA?

[37] On how I should construe the AA, I am guided by the following cases:

(a) In *Wong Kim Fatt*, at p 142, Chang Min Tat J (as His Lordship then was) decided as follows:

The third point made by Mr Lim (plaintiff's counsel) *was that assuming that the second defendant had the right to requisition under Article 21(d) he ought not in equity to be allowed to do so.* He submitted that this was very much a quasi-partnership since in this incorporation of two persons, both members were active operators in the Stock Exchange which was the reason for the existence of the company, and participated in the company's business in just the same way as if they had been partners. On this contention Mr Lim said that one partner could not expel another partner and that the proper action would be for the court to allow a winding-up, as in the case of *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, at p 499. Mr Mooney's (second defendant's counsel) reply to this was that if there was any reliance on equity there was nevertheless no equitable construction of an agreement: see *Scott v Liverpool Corporation* 44 All ER 1297, at p 1307, or rather there was no difference between law and equity as to the construction of an agreement. In any event the well known maxim is that equity follows the law. He suggested that *Ebrahimi*'s case was irrelevant but he thought there were many dicta from that judgment which substantially negatived the case for the plaintiff.

With respect, whatever the sympathies evoked by the sight of a slingless David confronted by a Goliath, there are in my view no facts and no circumstances raising up any equity against the second defendant. It is purely a matter of contractual obligation and the plaintiff must be held to the obligations he had undertaken. (Emphasis added.)

Based on *Wong Kim Fatt*, the AA should be construed in a contractual manner; and

(b) Jenkins LJ in the English Court of Appeal decided in *Holmes & Anor v Lord Keyes & Ors* [1958] 1 All ER 129, at p 138, as follows:

I think that the articles of association of the company should be regarded as a

> *business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable.* (Emphasis added.)

It is clear from *Holmes* that the AA should be interpreted as a business document whereby I should give reasonable business efficacy to the AA. *Holmes* has been affirmed by Sir Christopher Slade in *Bratton Seymour Service Co Ltd*, at p 699;

(c) according to *Bratton Seymour Service Co Ltd*, a term cannot be implied into AA from extrinsic circumstances but may be implied from the language of the AA itself, namely by way of constructional implication;

(d) In *Re Hartley Baird Ltd* [1954] 3 All ER 695, Ch D, at 696, Wynn-Parry J in the English High Court applied the maxim 'ut res magis valeat quam pereat' to interpret the AA. The maxim 'ut res magis valeat quam pereat' has been explained by Vaisey J in another English High Court case on construction of the AA, *Rayfield v Hands & Ors* [1958] 2 All ER 194, at p 196, as follows:

> I am not aware that this maxim [ut res magis valeat quam pereat] has ever been put into English, but I suggest that it directs us *to 'validate if possible'* (Emphasis added.)

Black's Law Dictionary, 9th Ed (2009), at p 1687, explains the maxim 'ut res magis valeat quam pereat' as 'to give effect to the matter rather than having it fail. A maxim of document construction applied when alternative readings are possible, one of which (usually the broader reading) would achieve the manifest purpose of the document and the other of which (usually the narrower reading) would render the document's purpose to futility or absurdity, whereby the interpreter chooses the construction that gives greater effect to the document's primary purpose'; and

(e) on appeal from Belize, Lord Hoffman delivered the opinion of the Privy Council in *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor* [2009] 2 All ER 1127, at 1132–1133, 1133–1134 and 1135, as follows:

> Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. *It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed:* see *Investors' Compensation*

Scheme Ltd v West Bromwich Building Society [1988] 1 All ER 98 at 114–115; [1998] 1 WLR 896 at 912–913. *It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*

The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

In some cases, however, *the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*
...

It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer — the implied term must go without saying'. it must be 'necessary to give business efficacy to the contract' and so on — but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?
...

The Board has already discussed the significance of 'necessary to give business efficacy' and 'goes without saying'. As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying *that a reasonable man would not have understood that to be what the instrument meant.* (Emphasis added.)

G. THE PLAINTIFF IS PROHIBITED BY AA FROM OBJECTING TO RE-ELECTION OF THE SECOND AND THIRD DEFENDANTS AS THE FIRST DEFENDANT'S DIRECTORS

[38] I reproduce arts 53, 66–70 and 72 as follows:

53. At any general meeting a resolution put to the vote of the meeting shall be decided on a poll.

66. At the first [AGM] all the Directors shall retire from office, and at the [AGM] in every subsequent year one-third (1/3) of the Directors for the time being, or if their number is not three (3) or a multiple of three (3) then the number nearest one-third (1/3) shall retire from office.

67. *A retiring Director shall be eligible for re-election.*

68. The Directors to retire in every year shall be those who have been longest in office since their last election, but as between person who become directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

69. *The Company at the meeting at which a Director so retires may fill the vacated office by electing a person thereto, and in default the Director shall if offering himself for re-election and not being disqualified under [CA] from holding office as a director be deemed to have been re-elected, unless at that meeting it is expressly resolved not to fill the vacated office or a resolution for the re-election of that Director is put to the meeting and lost.*

70. *The Board shall consist of 10 Directors*:

(a) *Five (5) directors representing [Plaintiff]*

(b) *Two (2) Directors representing [4th Defendant]*

(c) One (1) Director representing Global

(d) Two (2) Independent Directors to be appointed by the [BOD]

(e) *The Member [defined in Article 2 AA as the person registered as a shareholder of the 1st Defendant in the 1st Defendant's register of members] who nominated the appointment of a Director shall have the power to require the removal and substitution of any Director so appointed.*

(f) All appointments, removals and substitutions under the foregoing provisions of this clause shall be by notice in writing signed by a duly authorised officer of or representative for, the Member or, as the case may be, Members requiring the appointment, removal or substitution.

(g) *Notice of any appointment, removal or substitution of a Director shall be given to the Company at its registered office and within fourteen (14) Business Days thereafter, the Members shall join in procuring that such action is taken as is necessary under the [AA] to effect the appointment, removal or substitution, as the case maybe.*

72. *The Company may by ordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a Director on the day on which the director*

in whose place he is appointed was last elected a Director. (Emphasis added.)

G1. EFFECT OF ART 70

[39] I am of the following view regarding art 70:

(a) the BOD 'shall' consist of ten directors whereby five directors shall represent the plaintiff while three directors shall represent the minority shareholders of the first defendant. The use of the mandatory word 'shall' clearly shows that all shareholders of the first defendant are entitled to have representation in BOD ('BOD representation'). BOD representation for all shareholders of the first defendant is essential to protect the interest of the shareholders in respect of the management and operation of the first defendant. Article 77 of the AA provides, among others, that the first defendant's business 'shall be managed' by its directors;

(b) Article 70(e) provides that the shareholder who nominates a director ('nominating shareholder') 'shall have the power to require the removal and substitution of any Director so appointed'. A literal reading of art 70(e), in my opinion, has the following effect:

(i) only the nominating shareholder can require the removal and substitution of a director nominated by the nominating shareholder ('nominated director'); and

(ii) a shareholder who did not nominate a director (other shareholder), cannot require the removal and substitution of the nominated director.

The above interpretation is fortified by art 70(g) requiring the other shareholders to 'join in procuring that such action is taken as is necessary' to effect 'any appointment, removal or substitution' of the nominated director;

(c) the word 'appointment' in art 70(e), (f) and (g) should be implied to include the power of a nominating shareholder to re-nominate and re-appoint a nominated director who is required to retire by arts 66 and 68 (retiring director). This implication is based on the following reasons:

(i) the language of art 70(e), (f) and (g) itself, especially the wide term 'any' used in art 70(g), supports the above implication. This constructional implication is permissible according to *Bratton Seymour Service Co Ltd*;

(ii) in accordance with *Holmes*, the above implication will give reasonable business efficacy to the AA as a business document. If a nominating shareholder has initially appointed the retiring director, it is commercially efficacious for that nominating

shareholder to have the same power to re-nominate and re-appoint the retiring director; and

(iii) as explained in *Attorney General of Belize*'s case, a reasonable person would have understood that a nominating shareholder who has appointed the retiring director in the first place, should have the same power to re-nominate and re-appoint the retiring director. This implication 'goes without saying';

Accordingly, if only the nominating shareholder may re-appoint the retiring director under art 70(e), (f) and (g), the other shareholders have no power to object to the re-election of the retiring director. For the above reasons, I reject the plaintiff's contention that there is a clear distinction between the appointment of a nominated director and the re-election of a retiring director; and

(d) if any of the other shareholders can object to the re-election of the retiring director as re-nominated by the nominating shareholder, this will be contrary to:

(i) art 70 which ensures BOD representation for the nominating shareholder;

(ii) art 70(e) which vests the power to re-appoint the retiring director solely in the nominating shareholder; and

(iii) art 70(g) which requires all the other shareholders to procure the re-election of the retiring director.

[40] My above interpretation of art 70 does not prejudice the plaintiff in any manner. It is to be emphasised that the plaintiff has majority of the shares in the first defendant and has three representative directors in the BOD. On the other hand, if I accept the plaintiff's contention, the fourth to sixth defendants as minority shareholders of the first defendant will be prejudiced in the following manner:

(a) the plaintiff as the majority shareholder of the first defendant can always object successfully to any re-election of a retiring director nominated by any of the fourth to sixth defendants. It is to be noted that the minority shareholders cannot ever object successfully to the re-election of a retiring director nominated by the plaintiff; and

(b) upon the plaintiff's successful objection, the minority shareholder of the first defendant would not have any representative in the BOD until the 'replacement director' is acceptable to the plaintiff. This will be contrary to the minority shareholder's right of BOD representation as conferred by art 70(b) and (c). In fact, the plaintiff may deprive the fourth to sixth defendants of any representative in their BOD by refusing to accept any retiring director nominated by the fourth to sixth defendants.

[41] If I accede to the plaintiff's argument in this case, I will be re-writing the AA to confer a right on the plaintiff to decide whether a retiring director nominated by any of the fourth to sixth defendants, is acceptable to the plaintiff. I am not amenable to such a course of action. In *Grundt v Great Boulder Proprietary Gold Mines Ltd* [1948] 1 All ER 21, at 30, Greene MR in the English Court of Appeal cautioned against re-writing the AA by way of a purported construction of AA to avoid an alleged absurdity.

G2. ARTICLE 69 DOES NOT APPLY TO RE-ELECTION OF RETIRING DIRECTOR RE-NOMINATED BY NOMINATING SHAREHOLDER

[42] Article 69 is relied on by the plaintiff in this case. My considered view of art 69 is as follows:

(a) the opening words in art 69, namely 'The Company at the meeting at which a Director so retires may fill the vacated office by electing a person thereto' ('opening words'), does not change my above view regarding BOD representation, art 70(e) and (g). The opening words merely state that the first defendant may replace a retiring director. The opening words do not, in my opinion, confer a right on other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder; and

(b) I now consider the following words in art 69:

> in default the [Retiring Director] shall if offering himself for re-election and not being disqualified under [CA] from holding office as a director be deemed to have been re-elected, unless at that meeting [wherein the Retiring Director retires] it is expressly resolved not to fill the vacated office or a resolution for the re-election of that Director is put to the meeting and lost. ('closing words').
>
> I am of the opinion that the closing words do not entitle the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder. I opine as such because:
>
> (i) the closing words do not expressly or by constructional implication, allow the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder;
>
> (ii) if the closing words have the meaning contended by the plaintiff, this will be contrary to the nominating shareholder's right to BOD representation, art 70(e) and (g). I apply the maxim 'ut res magis valeat quam pereat' as illustrated in *Re Hartley Baird Ltd* and *Rayfield*, to give full effect to the nominating shareholder's right to BOD representation, art 70(e) and (g); and
>
> (iii) there is a canon of construction, 'generalia specialibus non

derogant', which provides that if there is a conflict between two provisions in the same document, the specific provision should prevail over the general provision. This maxim has been applied in statutory interpretation but according to Bowen LJ in the English Court of Appeal case of *Curtis v Stovin* (1889) LR 22 QBD 513, at 517, rules for construing statutes also apply to construe documents. In *Grundt*, at 28, Cohen LJ (as His Lordship then was) favoured a specific provision in the AA vis-a-vis a general provision in the AA. In applying the maxim 'generalia specialibus non derogant', I have no hesitation to give effect to the specific provisions of art 70(e) and (g) in preference to the general closing words.

G3. THE PLAINTIFF CANNOT RELY ON ARTS 53 AND 72

[43] Article 53 merely provides that a resolution at any general meeting of the first defendant shall be decided on a poll. Article 53 does not provide for the re-appointment of a retiring director, let alone confer a right on the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder.

[44] Article 72 concerns the power to remove a director before the expiration of his or her period of office and the re-appointment of another person in place of the removed director. Article 72 cannot be construed, either literally or by constructional implication, to entitle the other shareholders to object to the re-election of a retiring director re-nominated by the nominating shareholder.

[45] In any event, the specific provisions of art 70(e) and (g) should prevail over the general provisions of arts 53 and 72 by virtue of the application of the canon of construction, 'generalia specialibus non derogant'.

H. EFFECT OF THE SA AND SECOND DOA

[46] I shall now consider the SA and the second DOA. The first DOA does not apply in this case.

[47] In *Russell v Northern Bank Development Corpn Ltd* [1992] 3 All ER 161 (HL), at 166, Lord Jauncey explained the effect of a shareholders' agreement relating to a company vis-a-vis that company's AA:

> ... *while a provision in a company's articles which restricts its statutory power to alter those articles is invalid an agreement dehors the articles between shareholders as to how they shall exercise their voting rights on a resolution to alter the articles is not necessarily so.* In *Welton v Saffery* [1897] AC 299 at 331; [1895–1899] All ER Rep 567 at 585, which concerned an ultra vires provision in the articles of association authorising the company to issue shares at a discount, Lord Davey said:

> Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an, exception personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts.
>
> I understand Lord Davey there to be accepting that *shareholders may lawfully agree inter se to exercise their voting rights in a manner which, if it were dictated by the articles, and were thereby binding on the company, would be unlawful.* (Emphasis added.)

[48] In *Russell*:

(a) the company (fifth defendant) and its shareholders signed a shareholders' agreement regarding the management and control of the fifth defendant;

(b) the shareholders' agreement provided, among others, that the shareholders' agreement shall have precedence over the fifth defendant's AA and no further share capital shall be created by the fifth defendant without the written consent of the parties to the shareholders' agreement;

(c) the fifth defendant gave notice to its shareholders to increase its share capital (fifth defendant's proposal) and this was expressly allowed by art 131 of the Companies (Northern Ireland) Order 1986 (art 131);

(d) the plaintiff, one of the fifth defendant's shareholders who had signed the shareholders' agreement, instituted action against the other 4 shareholders who had signed the shareholders' agreement (first four defendants) to restrain the first four defendants from voting in favour of the fifth defendant's proposal;

(e) the High Court and majority of the Court of Appeal dismissed the plaintiff's suit on the ground that art 131 empowered the fifth defendant to proceed with the fifth defendant's proposal despite the shareholders' agreement; and

(f) the House of Lords unanimously allowed the plaintiff's appeal as against the first four defendants only (not against the fifth defendant) on the following grounds:

  (i) the shareholders' agreement was a private agreement which bound the first four defendants and could be enforced against them; and

  (ii) the shareholders' agreement could not fetter the fifth defendant's lawful exercise of its statutory powers under art 131.

[49] Our Federal Court in *Jet-Tech Materials Sdn Bhd*, at p 302, has referred to *Russell* in an oppression case. I am not aware of any Malaysian case which has applied *Russell* in a situation where the SA is at variance with the AA. I am of the view that *Russell* should apply in such a case. Accordingly, based on *Russell*, the SA and second DOA bind the plaintiff and fourth to sixth defendants even if the SA and second DOA are contrary to the AA. In this case, I do not find any inconsistency between the AA on the one hand and the SA and second DOA on the other hand.

I. HOW SHOULD SA AND SECOND DOA BE INTERPRETED?

[50] In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, at pp 606–607, Gopal Sri Ram FCJ held in the Federal Court as follows:

> The agreement in the present case is one that is not regulated by statute. In short, it is not a contract governed by the housing development legislation. The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom of contract to agree on any terms they thought fit. The role of the court is to interpret the contract in a sensible fashion. See *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1. As Lord Steyn said in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:
>
> > In determining the meaning of the language of a commercial contract, and unilateral contractual notices, *the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.* In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic. (Emphasis added.)

[51] In accordance with *Berjaya Times Squares Sdn Bhd*, I should construe the SA and the second DOA in a commercially sensible manner without undue emphasis on technical interpretations and niceties of language. I note in particular the following provisions in the SA:

(a) the SA regulates the relationship of the plaintiff and the fourth to sixth defendants as shareholders of the first defendant — please see Recital C to SA; and

(b) the purpose of the SA is to regulate the relationship of the parties to the SA in accordance with the terms and conditions of the SA — cl 2.1 SA.

[52] It is trite law that a term may be implied in a contract if the following two tests have been cumulatively fulfilled as laid down by Peh Swee Chin FCJ in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak*

Leong [1998] 3 MLJ 151, at pp 169–170:

> Implied terms are of three types. *The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contact.* ...
>
> *Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 *at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'.*
>
> *The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '... it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. *Business efficacy in my opinion, simply means the desired result of the business in question.* ...
>
> *Both tests in my opinion must be satisfied before a court infers an implied term.* Thus, Lord Wilberforce in *Liverpool City Council v Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.
>
> The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract.
>
> (Emphasis added.)

J. CLAUSE 3.1 BARS THE PLAINTIFF FROM OBJECTING TO THE SECOND DEFENDANT'S RE-ELECTION

[53] Clause 3.1 provides as follows:

> 3. *DIRECTORS OF THE [1st Defendant]*
>
> 3.1
>
> *The parties herby agree that in consideration of [6th Defendant] becoming a shareholder in [1st Defendant] and acquiring 10% of the ordinary issued and fully paid up shares of [1st Defendant] from [Plaintiff], [6th Defendant] shall have the power to require the appointment of one (1) Director to the Board of [1st Defendant] from [Plaintiff's] quota*

as provided for in Clause 6.2 SA [Clause 6.2] with the necessary modification to the respective documentation, including the [MA] and [AA] of [1st Defendant]. Accordingly, [2nd Defendant], who is currently a director on the [BOD] of [1st Defendant] representing [Plaintiff], will be Director representing [6th Defendant] after the shares have been transferred to [6th Defendant]. If additional approvals are required, the parties herein agree to cause [1st Defendant] to apply for the approval of [Bank Negara Malaysia] to facilitate the appointment of [6th Defendant's] Director. For the avoidance of doubt, after giving effect to the said acquisition, the composition of the board of directors of [1st Defendant] will be as follows:

Shareholders	Number of board seats
[Plaintiff]	3
[4th Defendant]	1
[5th Defendant]	1
[6th Defendant]	1
Independent	3
TOTAL	9

(Emphasis added.)

[54] I am of the following view regarding cl 3.1:

(a) cl 3.1 does not provide any right to the plaintiff, either expressly or by necessary implication, to object to the re-election of the second defendant as a director of the first defendant; and

(b) it is expressly, stated in cl 3.1 that the second defendant would continue to be the first defendant's director representing the sixth defendant and all parties agree to cause the first defendant to 'facilitate the appointment' of the sixth defendant's nominee.

[55] If I accept the plaintiff's contentions in this case, regrettably I will not be giving a reasonable commercial interpretation of cl 3.1 as required by *Berjaya Times Squares Sdn Bhd*.

[56] By the plaintiff's objection to the re-election of the second defendant as the sixth defendant's nominee at the AGM and the reconvened adjourned AGM, I am of the view that the plaintiff has breached cl 3.1.

K. CLAUSE 6.2 CONFERS RIGHT ON THE FOURTH TO SIXTH DEFENDANTS TO RE-APPOINT RETIRING DIRECTORS

[57] Clauses 6.2 and 6.3 provide as follows:

6. *DIRECTORATE OF THE BANK*

...

6.2 *Subject to the provisions of Clause 6.3, the [BOD] shall consist of Eight (8) Directors or such other number of Directors representing the Parties in proportion to their respective shareholdings for the time being in the [1st Defendant]* and such other number of Independent Directors as may be stipulated in the IBA and the directives and guidelines issued by BNM [Bank Negara Malaysia]:

6.2.1 *[Plaintiff] shall have the power to require the appointment of Four (4) Directors to the [BOD] and to require the removal substitution of any Director so appointed.*

6.2.2 *[4th Defendant] shall have the power to require the appointment of One (1) Director to the [BOD] and to require the removal and substitution of any Director so appointed.*

6.2.3 *GLOBAL shall have the power to require the appointment of One (1) Director to the [BOD] and to require the removal and substitution of any Director so appointed.*

6.2.4 The [1st Defendant] shall appoint tow (2) Independent Directors to the [BOD].

Subject to Section 43 of the IBA, the parties hereto shall take steps to amend and/or to procure the amendment of the Memorandum and Articles of Association so as to conform to the provisions of [Clause 6.2].

6.3 The appointment of a Director shall be subject to the approval of BNM and/or Minister of Finance *[MOF]*, the provisions of the IBA and the directives and guidelines issued by BNM. *The Party who nominates the appointment of a Director shall have the power to require the removal and substitution of any Director so appointed subject to the approval of BNM and/or [MOF], the provisions of the IBA and the directives and guidelines issued by BNM.* (Emphasis added.)

[58] The words 'Subject to the provisions of Clause 6.3, the [BOD] shall consist of Eight (8) Directors or such other number of Directors representing the Parties in proportion to their respective shareholdings for the time being in the [1st Defendant]' in cl 6.2 expressly confers the right to BOD representation on all of the first defendant's shareholders. The only exceptions to the right of first defendant's shareholder to appoint first defendant's director are provided in cl 6.3 in respect of approval by the BNM and MOF, provisions of IBA (now IFSA) and BNM's directives and guidelines. It is not disputed in this case that cl 6.3 does not apply to bar the re-election of the second and third defendants as the first defendant's directors.

[59] My above interpretation of cll 6.2 and 6.3 negative any right of any shareholder of the first defendant, including the plaintiff, to object to any appointment of a nominated director by a nominating shareholder.

[60] Further, I am of the considered view that the right of the first defendant's shareholder to appoint a director of the first defendant under cl 6.2 includes the right to re-nominate the same nominated director for re-election in the BOD. Such an implication fulfils both the subjective test of 'officious bystander' and the objective test of business efficacy as required by of *Sababumi (Sandakan) Sdn Bhd*.

[61] In view of the above reasons, the plaintiff has also breached cl 6.2 in opposing the re-election of the second and third defendants as the first defendant's directors.

L. CLAUSE 8.1 DOES NOT ASSIST THE PLAINTIFF

[62] Clause 8.1 provides as follows:

> 8 GENERAL MEETINGS
>
> 8.1 Save for the matters set out under Clause 8.2, the conduct of and proceedings at general meetings of the Bank shall be governed by the Memorandum and Articles of Association.

[63] Clause 8.1 merely provides that the conduct of the AGM and the Reconvened Adjourned AGM should be governed by the AA. I have opined above that art 70, in particular paras (e) and (g), do not allow the plaintiff to object to the re-election of the second and third defendants as the first defendant's directors. Even if I were wrong in interpreting art 70 in the manner I did, cll 3.1 and 6.2 clearly applied in this case to bar any objection by the plaintiff to the re-election of the second and third defendants as the first defendant's directors.

M. THE SECOND DOA AND SA BOUND THE PLAINTIFF IRRESPECTIVE OF THE AA

[64] As decided above, the plaintiff is not entitled to object to the re-appointment of the second and third defendants as the first defendant's directors by virtue of cll 3.1 and 6.2. I rely on *Russell* which allows the fourth to sixth defendants to counterclaim against the plaintiff based on cll 3.1 and 6.2 without involving the first defendant (which is only bound by the AA).

N. WHO MAY COUNTERCLAIM

[65] I hold that only the fourth to sixth defendants can enforce cll 3.1 and 6.2 against the plaintiff. The second and third defendants, despite being the subject matter of the plaintiff's objection in this case, has no cause of action to counterclaim against the plaintiff as they are not parties to the SA and second DOA. It is trite law that the doctrine of privity of contract as enunciated by the

Privy Council on appeal from Malaysia in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, at 174, only allows a contracting party to sue and claim for relief in a breach of contract.

O. RELIEF ON THE COUNTERCLAIM

[66] As I am satisfied that the plaintiff has breached cll 3.1 and 6.2, I allow prayers (iii), (vi), (vii), (viii), (ix) and (x) of the counterclaim to the fourth to sixth defendants.

[67] I will not order the following relief for reasons expressed below:

(a) prayer (i) of the counterclaim is not granted as such an issue has not been canvassed before this court;

(b) prayer (ii) of the counterclaim is refused as the first defendant's management must be conducted in accordance with the AA and not the SA. Similarly, prayer (xi) of the counterclaim is not ordered as the first defendant is not bound by the SA, first and second DOA; and

(c) prayers (iv) and (v) of the counterclaim are too wide and in any event, the interest of the fourth to sixth defendants will be sufficiently safeguarded by my above orders in respect of the counterclaim.

P. AD INTERIM INJUNCTION SHOULD BE SET ASIDE

[68] In view of my above decision, the ad interim injunction is hereby set aside.

[69] As the ad interim injunction only bound the first defendant, I will order an inquiry of damages to be held in respect of any loss or damage suffered as a result of the ad interim injunction by the first defendant only and costs of such an inquiry to be paid by the plaintiff to the first defendant.

Q. COURT'S DECISION

[70] Based on the above reasons, I order as follows:

(a) the court encl Nos 1 and 3 are dismissed with two sets of costs to be paid by the plaintiff to the:

  (i) the first defendant; and

  (ii) the second to sixth defendants;

(b) I grant prayers (iii), (vi), (vii), (viii), (ix) and (x) of the counterclaim for the fourth to sixth defendants only;

(c) the court encl No 8 is allowed with costs to be paid by the plaintiff to the second and third defendants;

(d) the ad interim injunction is set aside; and

(e) an inquiry of damages shall be held in respect of any loss or damage suffered as a result of the ad interim injunction by the first defendant only and costs of such an inquiry to be paid by the plaintiff to the first defendant.

[71] I must express my gratitude to learned counsel for all parties for their clear, succinct and persuasive submission, without which I will not be able to deliver this judgment.

R. THE PLAINTIFF'S LETTER DATED 17 SEPTEMBER 2014 (THE PLAINTIFF'S LETTER)

[72] After I have delivered the above oral judgment on 15 September 2014 ('oral judgment'), I received the plaintiff's letter at about 2.45pm, 17 September 2014 (copied to the solicitors for all the defendants) which drew my attention to the following:

(a) s 128(1) of the CA;

(b) the Court of Appeal's judgment in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, at p 695; and

(c) the Federal Court case of *Solaiappan & Ors v Lim Yoke Fan & Ors* [1968] 2 MLJ 21, at p 23

('further authorities').

[73] Firstly, I must thank the plaintiff's learned counsel for the further authorities. Rule 20(a) of the Legal Profession (Practice and Etiquette) Rules 1978 provides that an advocate and solicitor 'shall put before the Court any relevant binding decision, of which he is aware which is immediately in point, whether it be for or against his contention.' Counsel as an officer of the court has a duty not only to his or her client but also has a duty to assist the court to administer justice. I cite Mahadev Shankar JCA's judgment in the Court of Appeal case of *Yap Ban Tick & Ors v Standard Chartered Bank* [1995] 3 MLJ 401, at p 406, as follows:

> I think that this is an opportune moment to remind myself of what the Lord Chancellor, Lord Kilmuir said in September 1957 when he addressed the Faculty of Law of the University of Malaya, on '*The Importance of the Study of Law and the Legal Profession in a Democratic Community*' [1957] MLJ lvii. He said, (inter alia):
>
> > From what I have said, it is obvious that, in my opinion, the legal profession has great power and therefore great responsibility. We must never forget *that the lawyer has a double loyalty — to his client and to the law. He must do his utmost for*

the one but never at the expense of the other. There are many occasions in practice when it would help the client to ignore an inconvenient letter, not to correct a misconception in the judge's mind, or to suppress an adverse authority. It must never be done, because if the legal profession ceases to enjoy the confidence of the state, the state can no longer afford to abide by the rule of law, and democracy will perish. (Emphasis added.)

S. THIS COURT IS NOT FUNCTUS OFFICIO AND MAY RE-CONSIDER ORAL JUDGMENT

[74] The plaintiff's letter did not apply for me to re-consider the oral judgment. Nonetheless, I am duty bound in the interest of justice to re-consider the oral judgment based on the further authorities.

[75] As the judgment in this case has not been drafted, approved, sealed and extracted, it is clear that I am not functus officio and I have the jurisdiction to re-visit the oral judgment. Suffices for me to rely on the following two Federal Court decisions:

(a) *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265, at 266; and

(b) *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286, at 292–293.

T. FURTHER AUTHORITIES DO NOT AFFECT ORAL JUDGMENT

[76] Section 128(1) of the CA provides as follows:

A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed. (Emphasis added.)

[77] It is undisputed that the first defendant is a public company which is subject to s 128(1) of the CA. It is expressly provided in s 128(1) of the CA that s 128(1) of the CA shall prevail over AA.

[78] I am of the considered view that s 128(1) of the CA does not affect the oral judgment for the following reasons:

(a) in this case there is no removal of the second and third defendants as the first defendant's directors before the expiry of their office under s 128(1) of the CA. The sole issue in this case is whether the plaintiff is entitled under AA, SA and/or second DOA to object to the re-election of the

second and third defendants as the first defendant's directors at the AGM and the reconvened adjourned AGM. Accordingly, s 128(1) of the CA does not apply in this case. In any event, s 128(1) of the CA does not confer any right on the plaintiff to object to the re-election of the second and third defendants as the first defendant's directors;

(b) the plaintiff has relied on, among others, art 72, to support the closing words in art 69 so as to entitle the plaintiff to object to the re-election of the second and third defendants as the first defendant's directors. In the oral judgment, I have analysed art 69 (especially the closing words) as well as art 72 and opined that, among others, the nominating shareholders' right to BOD representation under art 70 does not allow the plaintiff to object to the re-election of the second and third defendants as the first defendant's directors. In other words, the critical provision in AA is art 70 and not arts 69 and 72;

(c) in the above sub-paras 40(a) and (b), I have taken the view that if the plaintiff has a right to object to the re-election of the second and third defendants as the first defendant's directors, the fourth to sixth defendants as minority shareholders of the first defendant may be prejudiced. Such a point of view has not been affected by s 128(1) of the CA which provides that a resolution by the first defendant to remove a director appointed to represent the interests of any particular class of shareholders shall not take effect until his or her successor has been appointed. This is because s 128(1) of the CA merely applies to removal and not to re-election of a director;

(d) in any event, the plaintiff is bound by cll 3.1 and 6.2 which are enforceable by the fourth to sixth defendants against the plaintiff irrespective of the binding effect of s 128(1) of the CA on the first defendant — please see *Russell*; and

(e) *Tuan Haji Ishak bin Ismail* and *Solaiappan* did not concern re-election of directors re-nominated by shareholders who were entitled to BOD representation under art 70, cll 3.1 and 6.2.

[79] The upshot is the oral judgment is maintained.

Order accordingly.

Reported by Kanesh Sundrum